BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion in the Circuit Court of Appeals for the Second Circuit (R. p. ....), is dated January 9, 1945 and is not yet reported.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is January 9, 1945.

The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28 U. S. C. Sec. 347.

III.

Statement of the Case.

This has already been stated in the preceding petition under I. pp. 1-3, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the respondent, having sought and received an award of

state compensation prior to the bringing of this action, had not elected his remedy, barring the instant cause.

2. The Circuit Court of Appeals erred in holding that the District Court had jurisdiction of a cause of action arising out of a seaman's being injured on land, on November 8, 1940.

3. The Circuit Court of Appeals erred in holding that a seaman on shore leave, under orders to return to his ship at a specified time to stand his regularly assigned watch, and being injured on land as he approached his vessel, was injured in the course of his employment.

V.

Argument.

The test of what constitutes an election of remedies is clearly and unambiguously announced by this Court in United States vs. Lumber Company 260 U. S. 290:

"3. Any decisive action by a party with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based on one or the other of the inconsistent remedies.

7. The election of remedies is determined by the bringing and maintenance of the suit and not by the final determination by the Court.

8. The doctrine of election of remedies and that of *res judicata* are not the same, but each is based on the maxim forbidding that one shall be twice vexed for one and the same cause".

Herein the Industrial Board of New York affirmed the award of compensation *six months* prior to the institution of this action. The respondent at the time of applying for compensation was represented by counsel and was therefore presumably aware of his rights and certainly of the facts. And it is to be noted that the respondent, recipient of an award of compensation *and* a judgment in a tort action *has never withdrawn* his claim for compensation.

The Circuit Court of Appeals ignored the above quoted law as enunciated by this Court and their decision is in direct conflict with the principle laid down.

POINT II.

Respondent allegedly sustained his injury on November 8, 1940. At that time the Courts of Appeals for the second, third, fifth and ninth circuits had held the courts to be without jurisdiction under the Jones Act, for seamen's shore injuries. In two of these cases, this Court had denied certiorari.

Todahl vs. Christenson, 5 Fed. 2d, 462 (9th Circuit) was decided in April, 1925.

The Montezuma, 19 Fed. 2d 355, (2d Circuit) was decided in May, 1927.

Esteves vs. Lykes Bros., 74 Fed. 2d 364 (5th Circuit) was decided in December 1934 and certiorari denied in May, 1935.

O'Brien vs. Calmar S. S. Corp., 104 Fed. 2d 148 was decided in May 1939 and certiorari denied in October of the same year.

On February 1, 1943, this Court, in O'Donnell vs. Great Lakes, etc., 318 U. S. 36, interpreted the Jones Act to apply to seamen's shore injuries suffered *in the course of the employment*. Now is presented the question as to whether the act applies to shore injuries sustained on land while the seaman is on *shore leave*, unconnected with the ship's business.

Thus for eighteen years prior to the decision in O'Donnell vs. Great Lakes, etc., *supra*, under the law of one circuit the Jones Act did not apply to shore injuries; for sixteen years, the law was such in two circuits; for nine years in three circuits and for four years in four circuits. And O'Donnell vs. Great Lakes, etc. *supra*, followed the last denial of certiorari by this Court by nearly four years.

On or about November 8, 1940 respondent entered into a contract of maritime employment with petitioner. If the decision in O'Donnell vs. Great Lakes, etc. *supra*, be given a retroactive effect, the terms and conditions of the contract of employment are altered and enlarged by a new liability and obligation imposed upon the petitioner in a cause of action that was not even pending at the date of the O'Donnell decision. The instant action was not filed until September 21, 1943, nearly seven months subsequent to the date of the O'Donnell decision by this Court.

The proposition urged is simply that the decision in the O'Donnell case should not be given retroactive effect upon an inchoate cause of action, whether that cause sound in contract or tort.

> "Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States Court as to the effect of a change of decision which detrimentally affects contract rights and

obligations entered into before such change, such rights and obligations should be determined by the law as judicially determined at the time the rights accrued".

Moore-Mansfield Cons. Co. vs. Elec. Install. Co., 234 U. S. 619.

At the time (November 8, 1940) that respondent's cause of action accrued, petitioner, as a derivative of the contract of employment, had a perfect defense to an action under the Jones Act. Such defense constituted a vested right.

"The moment a contract is made, a right is vested in each party to have it remain unaltered, and to have it performed".

Macedo vs. Macedo, 84 Pac. 2d 552, 554 (Cal.).

"There is a vested right in an accrued cause of action, in a defense to a cause of action, even in the statute of limitations".

Lewis vs. Penn. R. Co., 220 Pa. 317, 69 At. 821.

"The law to be applied is that in effect when the plaintiff's right to compensation arose, that is, when a compensable injury occurred".

Farmer vs. Bieber, etc., 172 At. 95.

"The plaintiff's rights must be determined by the law in force on the day of his injury".

Panico vs. Sperry, Etc., 15 At. 802.

So, if in this case, the decision of this court in the O'Donnell case be given a retroactive effect, petitioner herein is deprived of a defense, a vested right, available to it as an adjunct of the contract of employment.

We can find no case on all fours with the case at bar. There appear to be two lines of cases on the question, with much confusion of thought. The Circuit Court of Appeals, without giving us the benefit of a single authority, dismisses the point as follows:

"The decision of the Supreme Court in O'Donnell vs. Great Lakes, 318 U. S. 36, must be regarded as no more than a declaration of what was the law from the date the Jones Act took effect".

We urge that the question is of sufficient general importance that an authoritative decision is needed.

Mr. Justice Rutledge sat in the case of Warring vs. Colpoys, 122 Fed. 2d 642. Therein the Court said:

"* * * If later the Court reverses its construction, a new angle of thought is often injected * * * After all the statute always was the law * * * Since the two constructions are inconsistent, to be practical, the latter must be chosen as right, and the former never was the law. That means that just about everybody was fooled * * * But courts have often concluded that to apply the new construction to a previous transaction would be unjust. (Citing cases.)

"Where the law is changed by judicial decision, such change will not affect transactions made with reference to the law as it stood previous to such change".

Metzger vs. Greiner, 9 O. C. C. N. S. 364.

"Any and all citizens have a right, in the arrangement of their affairs, to assume that an interpretation of a statute by the Supreme Court of the state is the law of that subject and a subsequent contra decision should not be given a retroactive effect".

Mercantile Bank vs. Lander, 12 OFD 426.

POINT III.

Respondent was allegedly injured whilst returning to his ship from leave ashore (R. pp. 90 and 91). The specious argument that he was under orders to return is offered. He was returning to perform his regularly assigned duty as second cook—to prepare the crew's midnight lunch. Every member of a crew granted shore leave is under orders to

return, and if respondent's argument be sound, then every officer and man going ashore on leave is in the course of his employment from the time he leaves his vessel until he returns, no matter where he goes or in what manner he spends his time ashore.

The question of whether a seaman injured ashore while on leave is in the course of his employment as distinguished from service of the ship is certainly a question of great importance to the shipping industry and should be authoritatively determined. Clearly respondent is entitled to maintenance and cure if he can make a case on the merits, but that contractual obligation on the part of the petitioner is a vastly different question from the latter's liability in tort under the Jones Act.

Looking to the meaning of the phrase "course of employment" in the light of the Employer's Liability Act, the pertinent provisions of which are incorporated in the Jones Act:

> "If the employee at the time of the accident was not in discharge of a duty he was not entitled to protection".
>
> Koonse vs. Mo. Pac. Ry., 322 Mo. 813.
> (Cer. den. 280 U. S. 582).

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

ULYSSES S. THOMAS,
Counsel for Petitioner.